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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

WISHTOYO FOUNDATION, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents; CITY OF OXNARD, Real Party in Interest and Respondent.	B285271 (Los Angeles County Super. Ct. No. BS159479)
WISHTOYO FOUNDATION, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD, Defendant and Respondent.	B286465 (Los Angeles County Super. Ct. No. BS163728)

APPEALS from orders of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Lawyers for Clean Water, Caroline A. Koch; Wishtoyo Foundation, Jason A. Weiner, Geneva Thompson; and John B. Murdock for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Robert W. Byrne, Assistant Attorney General, and Eric M. Katz, Deputy Attorney General, for Defendants and Respondents.

Olivarez Madruga Lemieux O'Neill, W. Keith Lemieux and Brigitte G. Kay for Real Party in Interest and Respondent in Case No. B285271.

The Wishtoyo Foundation appeals from the trial court's denial of two petitions for writs of mandate, both of which challenge decisions of the State Water Resources Control Board (State Board), and one of which also challenges a decision of the California Regional Water Quality Control Board, Los Angeles Region (Regional Board).[1] We have consolidated the appeals as they primarily raise the same arguments: that the Boards may not issue a master recycling permit or statewide general order without first determining whether the recycled water regulated by these actions will be used reasonably and in a manner that protects public trust resources. We conclude that the trial court did not err in denying the petitions. The courts may not order the Boards to exercise their discretion to regulate the use of recycled water in the specific ways requested by Wishtoyo. We affirm.

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[1] We refer to the State Board and Regional Board collectively as "the Boards."

FACTUAL AND PROCEDURAL BACKGROUND

Wishtoyo's first petition for writ of mandate challenged the issuance of a master recycling permit by the Regional Board with respect to a recycled water program run by the city of Oxnard. Wishtoyo's second petition for writ of mandate challenged a statewide general order issued by the State Board that established procedures under which suppliers, distributors and users of recycled water could apply for a permit to use recycled water. We address the factual and procedural history of each petition in turn.

1. Wishtoyo's First Petition for Writ of Mandate

a. The Oxnard GREAT program

In the early 2000's, the city of Oxnard, anticipating water supply shortages and aware of the overtaxed groundwater aquifer, developed the Groundwater Recovery Enhancement and Treatment (GREAT) program. The program involved the construction of a wastewater treatment plant and recycled water delivery system to convey recycled water to farmers. Oxnard intended that farmers "would use recycled water produced as part of the program instead of groundwater."

In 2008, the Regional Board issued a "master recycling permit" to Oxnard (Master Recycling Permit).[2] The permit approved the delivery of recycled water from the GREAT treatment plant to western Ventura County for agricultural irrigation. The permit set out Oxnard's responsibilities for the production, distribution, and application of recycled water,

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[2] Under Water Code section 13523.1, a regional board may issue a master recycling permit to a supplier or distributor, or both, of recycled water in lieu of issuing waste discharge requirements or water recycling requirements. (*Id.,* subd. (a).)

including "processing individual end-users' applications, inspecting point-of-use facilities, and ensuring end-users' compliance with the water recycling requirements contained in this Order."

b. The 2015 amendment

In 2015, the Regional Board prepared a tentative amendment to the Master Recycling Permit, the purpose of which was to allow the temporary use of a "salinity management pipeline" to transport recycled water from the GREAT treatment plant to the irrigation network of the Pleasant Valley County Water District.

At a public hearing on the proposed amendment, Wishtoyo objected to the amendment, arguing that article X, section 2 of the California Constitution requires water to be used reasonably, and the Pleasant Valley County Water District was growing "water-intensive crops that are not sustainable for the region and have otherwise not implemented best available water efficiency and conservation practices." Wishtoyo requested that "the state mandat[e] that for all new reclaimed water supplied by Oxnard GREAT to end-user[s] in the Oxnard Plain . . . . [¶] . . . the [Master Recycling Permit] should require [the District] to decrease the amount of Santa Clara River flows it diverts by the amount of water Oxnard GREAT provides to [the] Pleasant Valley District."

The Regional Board approved the amendment. Wishtoyo petitioned the State Board for review. The State Board did not respond within 90 days, effectively denying the petition.

c. Wishtoyo petitions for writ of mandate

Wishtoyo filed a petition for writ of mandate and complaint in the trial court challenging the Regional Board's approval of the

2015 amendment and the State Board's denial of review.[3] The petition alleged that the Boards failed to ensure that the use of recycled water authorized by the Master Recycling Permit was reasonable or consistent with the public trust doctrine.

The Boards demurred. The court sustained the demurrer to the traditional mandamus claim against the State Board, and the claims against the Boards for failure to perform public trust duties, and for declaratory relief. After trial on the remaining cause of action for administrative mandamus based on the Regional Board's alleged failure to ensure the reasonable use of water resources, the trial court denied the petition. Wishtoyo timely appealed.

2. Wishtoyo's Second Petition for Writ of Mandate

a. The General Order

In 2014, California's governor proclaimed a Drought State of Emergency finding that "California's water supplies continue to be severely depleted despite a limited amount of rain and snowfall this winter, with record low snowpack in the Sierra Nevada mountains, decreased water levels in most of California's reservoirs, reduced flows in the state's rivers and shrinking supplies in underground water basins." The Governor directed the State Board to "adopt statewide general waste discharge requirements to facilitate the use of treated wastewater . . . in order to reduce demand on potable water supplies." The State Board thereafter adopted waste discharge requirements regulating the use of recycled water in the state.

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[3] The "Los Angeles Region" was also a named defendant, and Oxnard, a real party in interest in case No. B285271. Both are respondents on appeal.

Two years later, in 2016, the State Board adopted a general order (General Order) that replaced the 2014 waste discharge requirements with water *reclamation* requirements in order "to recognize that recycled water is a resource."[4] The General Order's purpose was to encourage recycled water use by (1) streamlining the permitting process for users of recycled water, and (2) allowing large users to apply for a single permit instead of obtaining permits from multiple regional water boards. The General Order set forth the application process by which proposed suppliers, distributors and users of recycled water could obtain approval from their regional water board.

b. Wishtoyo objects to the General Order

In January 2016, the State Board circulated a draft of the General Order for public comment. Wishtoyo submitted a letter objecting to the State Board's "routine[]" approval of "new water supplies, such as recycled water, without analyzing whether or ensuring that the new water will be, or is being, managed and used reasonably and not wastefully." In particular, Wishtoyo objected that "the General Order allows end users to grow water[-]intensive crops that may not be sustainable for the region in which they are grown, and allows use by municipal and agricultural end users that have not implemented best available water efficiency and conservation practices." Wishtoyo argued that the General Order (1) failed to provide any process to ensure that a reasonable use analysis is conducted before authorizing the use of recycled water, (2) did not provide guidelines to ensure reasonable use, and (3) did not condition approval of an application on the reasonable use of recycled water.

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[4] The Water Code authorizes the boards to issue water reclamation requirements to set forth criteria for producers, distributors and users of recycled water. (§§ 13523, 13528.5.)

In June 2016, the State Board conducted a public hearing during which Wishtoyo reiterated its objections. The Board chair responded that "someday we will be making these decisions more. But at the moment getting folks off potable and to recycled water is the next step in many, many places but we have to make a localized determination about these, not a broad categorical statement." The State Board unanimously adopted the order.

c. Wishtoyo petitions for writ of mandate

In July 2016, Wishtoyo filed a petition for writ of mandate challenging the State Board's approval of the General Order. Wishtoyo asked the court to order the Board "to conduct an analysis of the uses and management of recycled water authorized by the General Order to ensure . . . consisten[cy] with the reasonable use provisions of the California Constitution, the California Water Code, and the Public Trust Doctrine."

In the State Board's opposition, it argued that it was not required to conduct a " 'waste and unreasonable use' " analysis before adopting the permit, but that it nonetheless had. According to the State Board, the "challenged permit promotes the reasonable use of water by streamlining the permitting process to bring more recycled water online quicker." The State Board further argued that it had no duty to consider impacts on public trust resources but that it had "by prohibiting recycled water facilities from diminishing" wastewater discharge to waterways "without first obtaining a separate approval from the State Board."

The trial court denied the petition and Wishtoyo timely appealed.

DISCUSSION

1. Traditional and Administrative Mandamus

The Board's General Order was subject to traditional mandamus review because it established procedures by which entities could apply for recycled water permits. "[T]raditional mandamus under [Code of Civil Procedure] section 1085 applies to '[q]uasi-legislative' decisions, defined as those involving ' "the formulation of a rule to be applied to all future cases," ' while administrative mandamus under section 1094.5 applies to 'quasi-judicial' decisions, which involve ' "the actual application of such a rule to a specific set of existing facts." ' " (*Southern California Cement Masons Joint Apprenticeship Committee v. California Apprenticeship Council* (2013) 213 Cal.App.4th 1531, 1541.)

Traditional mandamus under Code of Civil Procedure section 1085 "may be employed to compel the performance of a duty which is purely ministerial in character; it cannot be applied to control discretion as to a matter lawfully entrusted to the [government entity]." (*State v. Superior Court* (1974) 12 Cal.3d 237, 247.) Under section 1085, " ' "review is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking in evidentiary support[,]" . . . ' [and] [t]he petitioner has the burden of proof to show that the decision is unreasonable or invalid as a matter of law. . . . We review the record de novo except where the trial court made foundational factual findings, which are binding on appeal if supported by substantial evidence." (*Citizens for Improved Sorrento Access, Inc. v. City of San Diego* (2004) 118 Cal.App.4th 808, 814, citations omitted.)

The Regional Board's amendment of the Master Recycling Permit, on the other hand, was subject to administrative mandamus review: the "decision to grant or deny a permit is a quasi-judicial function, and a petition for writ of mandate challenging such a decision is governed by the standards of Code

of Civil Procedure section 1094.5." (*California Assn. of Sanitation Agencies v. State Water Resources Control Bd.* (2012) 208 Cal.App.4th 1438, 1453 (*Sanitation Agencies*).)

Under Code of Civil Procedure section 1094.5, "the trial court inquires into whether the agency 'proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.' (Code Civ. Proc., § 1094.5, subd. (b).)" (*Sanitation Agencies*, *supra*, 208 Cal.App.4th at p. 1453.) " 'On appeal, the reviewing court determines whether substantial evidence supports the trial court's factual determinations. [Citations.] The trial court's legal determinations receive a de novo review with consideration being given to the agency's interpretations of its own statutes and regulations.' " (*Ibid.*)

2. The Duty to Prevent the Unreasonable Use of Water Resources

In its writ petition challenging the Master Recycling Permit, Wishtoyo alleged that the California Constitution and Water Code require that the Regional Board "analyze whether, and ensure that, the use of recycled water authorized by the [permit] is reasonable and not wasteful." Likewise, in the writ petition challenging the General Order, Wishtoyo alleged that the State Board was required to conduct a reasonable use analysis "regarding the use and management of recycled water" or to "provide guidelines or . . . procedures that ensure the reasonable use . . . analysis is conducted properly . . . ."

The duty to prevent the unreasonable use of water resources is set forth in the state Constitution and the Water Code. The California Constitution provides that the right to

water or to use water is limited to such water as is "reasonably required for the beneficial use to be served," and does not extend to "the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." (Cal. Const., art. X, § 2; see also Water Code, § 100.) The Constitution further requires that "the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented . . . ." (*Ibid.*) Water Code section 100 reiterates this requirement.[5] Section 275, in turn, provides that the Board "shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state."

Here, Wishtoyo's petitions seek to compel the Boards to analyze whether the recycled water authorized by the Master Recycling Permit and General Order will be used reasonably. Wishtoyo argues that the state Constitution and Water Code section 100 require the Boards to conduct this analysis in order to prevent the unreasonable use of recycled water. However, the general mandate that water resources be used reasonably does not translate into a specific duty or legal requirement that the Boards make this analysis whenever issuing a master recycling permit or statewide general order governing recycled water. The California Constitution and section 100 task the Boards with the duty of preventing the unreasonable waste of water without specifying how the Boards must carry out this duty. Similarly, section 275 imposes a mandatory duty on the Boards to take "all appropriate proceedings or actions" to prevent the unreasonable

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[5] All further undesignated statutory references are to the Water Code.

use of water, thereby vesting in the Boards with discretion as to how to perform this duty.[6] Mandamus cannot be used to compel "the exercise of discretion in a particular manner . . . when the underlying decision is purely discretionary." (*US Ecology, Inc. v. State of California* (2001) 92 Cal.App.4th 113, 138.)

Wishtoyo argues that it is not seeking to compel the Boards to exercise their discretion in a particular manner, but simply to compel the Boards to act. Wishtoyo acknowledges there are multiple ways the Boards could carry out their duty to ensure the reasonable use of recycled water. For example, with respect to the General Order, Wishtoyo suggests the Board could provide guidelines on recycled water use or ban the use of recycled water on certain water-intensive crops. What Wishtoyo argues is that the Boards cannot choose to "do nothing."

We agree, and the Boards agree. The Boards argue that Wishtoyo has not shown that "nothing" is being done because there are still other actions the Boards can take to prevent the unreasonable use of recycled water, such as selectively prosecuting users that commit waste. (§ 1251; Cal. Code Regs., tit. 23, §§ 4001–4007.) The Boards are correct. While the record shows that the state's water supplies are severely depleted, Wishtoyo does not argue that the recycled water processed via the procedures authorized by the General Order and the Master

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[6] Wishtoyo also cites to section 174, passed in 1967, which sets forth the Legislature's intent to combine the state agency with responsibility for water *rights* with the state agency responsible for water *quality*. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 695–696.) However, there is no precedent interpreting section 174 to mandate that water quality permits such as the Master Recycling Permit, or applications governed by the General Order, meet the same requirements as water rights permits, as Wishtoyo suggests.

Recycling Permit is being used unreasonably. Wishtoyo's argument is that the Boards have failed to take any action to prospectively consider whether water permitted by these processes will be used unreasonably. However, the Boards, in their discretion, may choose to prevent the unreasonable use of recycled water in another manner, for example, by selectively prosecuting users who commit waste.

Wishtoyo's citation to case law does not convince us otherwise. Wishtoyo primarily relies on two cases in support of its argument that the state Constitution and the Water Code impose a mandatory duty on the Boards to conduct a prospective reasonable use analysis whenever they "allocate" water: *Elmore v. Imperial Irrigation Dist.* (1984) 159 Cal.App.3d 185 (*Elmore*) and *Central Delta Water Agency v. State Water Resources Control Board* (2004) 124 Cal.App.4th 245 (*Central Delta*). The Boards argue that an "allocation" of water is not synonymous with an "appropriation" of water. While the State Board's duty to consider an entity's potential reasonable use of water arises from an application to "appropriate" water from a natural water body, Wishtoyo does not cite to case law applying this duty to an "allocation" of water. (See *Central Delta*, at pp. 257-264.)

Neither *Elmore* nor *Central Delta* stands for the proposition that the Boards were required to conduct a reasonable use analysis here. Both cases involved waste of riparian and/or appropriative water rights, and had nothing to do with the permitting and use of recycled water.

In *Elmore*, the court held that mandamus was appropriate where the petitioner had stated facts showing that a local water district had caused substantial volumes of fresh water to needlessly flow into the Salton Sea, resulting in a rising surface level of the sea that flooded thousands of acres of land with salt water. The court found the district had a mandatory duty "to

avoid water waste, prevent flooding resulting from its irrigation practices and provide drainage made necessary by its activities." (*Elmore*, *supra*, 159 Cal.App.3d at p. 198.) In support of its holding, the court relied on sections of the Water Code directing the water district to provide drainage to flooded lands when the flooding was caused by the district's irrigation practices. (*Elmore,* at p. 195.) The court also cited to the constitutional duty to avoid water waste. (*Id.* at p. 193.)

In *Central Delta*, a local water district challenged the State Board's permit to divert delta river water to reservoirs that were to be constructed on two islands in the delta. (*Central Delta*, *supra*, 124 Cal.App.4th at p. 252.) In issuing the permit, the State Board only evaluated *potential* uses to which the appropriated water would be put. (*Id.* at pp. 252–253.) The Court of Appeal concluded that the State Board was required to evaluate the "*actual* intended use" of the water to be appropriated, and cited to provisions of the Water Code that govern the State Board's issuance of a license to appropriate water. (*Id.* at p. 264, italics added.) The court found that the State Board had "failed to meet the criteria of the *Water Code and implementing regulations* for determining the reasonable amount of water required for a specific beneficial use." (*Ibid.*, italics added.)

Both *Central Delta* and *Elmore* involve the enforcement of specific sections of the Water Code that do not apply to the General Order or Master Recycling Permit. The present appeals do not address the appropriation of water, as in *Central Delta* where the court directed the State Board to comply with Water Code provisions and supporting regulations governing appropriations. (*Central Delta*, *supra*, 124 Cal.App.4th at pp. 260-261 & fn. 13.) Nor do they deal with land flooded through a water district's irrigation practices, as in *Elmore*. (*Elmore*,

supra, 159 Cal.App.3d at p. 195.) To the extent the *Elmore* court cited to the constitutional duty to prevent water waste, the court was addressing the water district's documented fresh water waste. (*Id.* at p. 198.) Here, Wishtoyo does not argue that the recycled water authorized by the Master Recycling Permit and General Order has been used unreasonably or wasted, only that the Boards should consider if it will be.

In short, the cited law does not provide authority for Wishtoyo's argument that the Boards had a duty to prospectively conduct a reasonable use analysis in the Master Recycling Permit or General Order.

Wishtoyo's concern that the Boards *should* be treating the permitting of recycled water the same as the allocation of fresh water raises a policy question outside our prerogative to decide. We cannot issue the orders Wishtoyo requests but must cede to the Boards the decisions how to carry out their duty to regulate and permit the use of recycled water. (See *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 130 ["The decision is essentially a policy judgment requiring a balancing of the competing public interests, one the Board is uniquely qualified to make in view of its special knowledge and expertise and its combined statewide responsibility to allocate the rights to, and to control the quality of, state water resources."].)

3. The Public Trust Doctrine

Wishtoyo argues that the Boards failed to consider the impact that the Master Recycling Permit or General Order would have on natural water bodies and groundwater basins. Specifically, Wishtoyo argues the General Order authorizes the unreasonable use of recycled water in "way[s] that potentially threaten[] the public interest in the surrounding waterways." As for the Master Recycling Permit, "the allocation of recycled water allows continued harm to the public's interest in the Santa Clara

River." We conclude the public trust doctrine did not require the Boards to consider whether the use of recycled water authorized by the Master Recycling Permit and General Order would lead to users' reduction of demands on public waterways and groundwater basins.

Under the public trust doctrine, the State owns its navigable waters, tidelands, and submerged lands of navigable waters as trustee of a public trust for the benefit of the people. (See *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434.) The purpose of the public trust doctrine is to protect navigation, commerce, fishing, recreational uses, fish and wildlife habitat, and aesthetics. (*Id.* at p. 435.) "The State has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." (*Id.* at p. 446; see also *San Francisco Baykeeper, Inc. v. State Lands Commission* (2018) 29 Cal.App.5th 562, 569.)

The public trust analysis "begins and ends with whether the challenged activity harms a navigable waterway and thereby violates the public trust." (*Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 860 (*Environmental Law Foundation*).) The "dispositive issue is not the source of the activity, or whether the water that is diverted or extracted is itself subject to the public trust, but whether the challenged activity allegedly harms a navigable waterway." (*Ibid.*) The "government has a duty to consider the public trust interest when making decisions impacting water that is imbued with the public trust." (*Id.* at p. 861.)

In *Environmental Law Foundation*, the court held that the State Board had the duty to regulate extractions of groundwater that affected public trust uses in a river. (*Environmental Law*

Foundation, *supra,* 26 Cal.App.5th at pp. 860-862.) Although the State Board argued that groundwater is not navigable or a public trust resource, the court noted that the water subject to the trust was the adjacent river that was negatively impacted by the extraction of the groundwater. (*Id.* at p. 859.)

Here, Wishtoyo argues that the use of recycled water authorized by the General Order and Master Recycling Permit has the potential to negatively impact groundwater basins and navigable rivers. However, unlike in *Environmental Law Foundation*, where the pumping of groundwater connected to a river had the *direct* effect of reducing the surface flows of that river, here, there is no evidence that the use of recycled water will have any impact on fresh water flows. Rather, the use of recycled water has the potential to reduce demands on public trust resources. The permit enables treated wastewater to be used for irrigation instead of discharging it into the ocean.

Wishtoyo's position is that the General Order and Master Recycling Permit *should* require regulated users of recycled water to demonstrate their recycled water usage will reduce their demands on groundwater basins and rivers. While the stated intent of the General Order was to facilitate the use of treated wastewater "in order to reduce demand on potable water supplies," and the stated intent of the Master Recycling Permit was that farmers use recycled water "instead of groundwater," the public trust doctrine does not require that the Boards determine these goals will be met in order to issue recycled water permits,

4. The Factual Findings Challenged Are Not Foundational

Wishtoyo argues that several findings in the Master Recycling Permit and General Order are not supported by

substantial evidence. Wishtoyo challenges findings that the Master Recycling Permit improves "water supply availability" and puts "the state's water to beneficial use to the fullest extent capable," citing to section 100. Wishtoyo similarly challenges the General Order's finding that the order reduces demand on the state's water resources by encouraging the use of recycled water. According to Wishtoyo, the Boards were legally required by article X, section 2 of the California Constitution and Water Code section 100 to make these findings and support them with substantial evidence. We disagree.

In administrative mandamus proceedings under Code of Civil Procedure section 1094.5, "the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and [the] ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) Our review of a petition for writ of traditional mandamus under Code of Civil Procedure section 1085 is limited to determining whether "*foundational* factual findings" are supported by substantial evidence. (*Citizens for Improved Sorrento Access, Inc. v. City of San Diego*, *supra,* 118 Cal.App.4th at p. 814, italics added.) Therefore, the question before us is whether the factual findings challenged by Wishtoyo were foundational or necessary to bridge the "analytic gap" such that the General Order or Master Recycling Permit would be entirely lacking in evidentiary support if those findings are unsupported by substantial evidence. (See *City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1409; *Topanga*, *supra*, at p. 515.)

Wishtoyo contends the findings were necessary because the Boards were required by the state Constitution and Water Code to incorporate a reasonable use analysis into the General Order and Master Recycling Permit. We have already concluded the

Boards were not required to do so. As Wishtoyo has not pointed to any legal requirement that the Boards make these findings, we conclude they were not foundational.

DISPOSITION

The orders are affirmed. Respondents are awarded their costs on appeal.

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J.

WILEY, J.